tive subject-matter of jurisdiction—and if it is, why should not the act of dissolving it be recognised in a foreign jurisdiction; hence it is that two other questions are involved, namely, whether or not marriage is a status; and secondly, the effect of an *ex parte* decree of divorce; because if alimony is an incident of a divorce, and only grantable in the divorce proceeding, it should be allowed in an *ex parte* divorce proceeding, if such proceeding is valid, and it will be valid if marriage is a status and that status is a jurisdictional subject-matter. And if it is not valid, if granted in an *ex parte* divorce proceeding, it cannot be said to be incident to a divorce. Or, in other words, alimony is incident to a divorce if it can be granted in a valid *ex parte* divorce, and it is not incident if it cannot be so granted.

Perhaps the solution is that marriage is a status, hence an *ex parte* divorce is valid because it acts upon this status. Alimony cannot be decreed *ex parte*, because it is different from the thing "status," and there is no jurisdiction to decree *in personam* in *ex parte* proceedings; hence it can be decreed after an *ex parte* divorce or else there would be a failure of justice. Alimony cannot be decreed after a divorce *inter parties*, because the court then has jurisdiction of the *status* and the *person*, and hence all matters involved, or could have been involved, must be adjudicated. The questions, whether or not marriage is a status, and the validity and effect of an *ex parte* divorce, are connected with this doctrine of domicile.

JNO. F. KELLY.

Bellaire, Ohio.

RECENT ENGLISH DECISIONS.

House of Lords.

JOHN WESTON FOAKES *v.* JULIA BEER.

An agreement between judgment debtor and creditor that, in consideration of the debtor paying down part of the judgment debt and costs, and on condition of his paying to the creditor, or his nominee, the residue by instalments the creditor will not take any proceedings on the judgment, is *nudum pactum*, being without consideration, and does not prevent the creditor, after payment of the whole debt and costs, from proceeding to enforce payment of the interest upon the judgment.

Pinnel's Case, 5 Rep. 117 a., and *Cumber* v. *Wane*, 1 Str. 426, followed.

An agreement not to take proceedings if the debtor shall pay certain specified instalments "until the whole of the said sum of 2090*l.* 19*s.* shall have been fully paid," the said sum being the principal alone without interest, gives the creditor no right to interest if the condition as to payment of instalments is fulfilled.

APPEAL from an order of the Court of Appeal.

On the 11th of August 1875, the respondent recovered judgment against the appellant for 2077*l.* 17*s.* 2*d.* for debt, and 13*l.* 1*s.* 10*d.* for costs. On the 21st of December 1876, a memorandum of agreement was made and signed by the appellant and respondent in the following terms:

"Whereas, the said John Weston Foakes is indebted to the said Julia Beer, and she has obtained a judgment in Her Majesty's High Court of Justice, Exchequer Division, for the sum of 2090*l.* 19*s.* And whereas the said John Weston Foakes has requested the said Julia Beer to give him time in which to pay such judgment, which she has agreed to do on the following conditions: Now this agreement witnesseth, that in consideration of the said John Weston Foakes paying to the said Julia Beer, on the signing of this agreement, the sum of 500*l.*, the receipt whereof she doth hereby acknowledge, in part satisfaction of the said judgment debt of 2090*l.* 19*s.*, and on condition of his paying to her or her executors, administrators, assigns or nominee the sum of 150*l.*, on the 1st day of July and the 1st day of January, or within one calendar month after each of the said days respectively in every year, until the whole of the said sum of 2090*l.* 19*s.* shall have been fully paid and satisfied; the first of such payments to be made on the 1st day of July next, then she, the said Julia Beer, hereby undertakes and agrees that she, her executors, administrators or assigns will not take any proceedings whatever on the said judgment."

The respondent having in June 1882 taken out a summons for leave to proceed on the judgment, an issue was directed to be tried between the respondent, as plaintiff, and the appellant, as defendant, whether any and what amount was, on the 1st of July 1882, due upon the judgment.

At the trial of the issue before CAVE, J., it was proved that the whole sum of 2090*l.* 19*s.* had been paid by instalments, but the respondent claimed interest. The jury, under his lordship's direction, found that the appellant had paid all the sums which, by the agreement of the 21st of December 1876, he undertook to pay, and within the times therein specified. CAVE, J., was of opinion that, whether the judgment was satisfied or not, the respondent was, by reason of the agreement, not entitled to issue execution for any sum on the judgment.

The Queen's Bench Division (WATKIN WILLIAMS and MATHEW,

JJ.) discharged an order for a new trial on the ground of misdirection.

The Court of Appeal (BRETT, M. R., LINDLEY and FRY, L. JJ.) reversed that decision and entered judgment for the respondent for the interest due with costs.

W. H. Holl, Q. C., for appellant.

Bompas, Q. C., for respondent.

EARL OF SELBORNE, L. C.—My Lords, upon the construction of the agreement of the 21st of December 1876, I cannot differ from the conclusion in which both the courts below were agreed. If the operative part could properly be controlled by the recitals, I think there would be much reason to say that the only thing contemplated by the recitals was giving time for payment, without any relinquishment, on the part of the judgment creditor, of any portion of the amount recoverable (whether for principal or for interest) under the judgment. But the agreement of the judgment creditor, which follows the recital, is that she "will not take any proceedings whatever on the judgment" if a certain condition is fulfilled. What is that condition? Payment of the sum of 150*l.* in every half year, "until the whole of the said sum of 2090*l.* 19*s.*" (the aggregate amount of the principal debt and costs, for which judgment had been entered) "shall have been fully paid and satisfied." A particular "sum" is here mentioned, which does not include the interest then due or future interest. Whatever was meant to be payable at all, under this agreement, was clearly to be payable by half-yearly instalments of 150*l.* each; any other construction must necessarily make the conditional promise nugatory. But to say that the half-yearly payments were to continue till the whole sum of 2090*l.* 19*s.*, "and interest thereon," should have been fully paid and satisfied, would be to introduce very important words into the agreement, which are not there, and of which I cannot say that they are necessarily implied. Although, therefore, I may (as indeed I do) very much doubt whether the effect of the agreement, as a conditional waiver of the interest to which she was by law entitled under the judgment, was really present to the mind of the judgment creditor, still I cannot deny that it might have that effect, if capable of being legally enforced.

But the question remains, whether the agreement is capable of

being legally enforced. Not being under seal, it cannot be legally enforced against the respondent unless she received consideration for it from the appellant, or unless, though without consideration, it operates by way of accord and satisfaction, so as to extinguish the claim for interest. What is the consideration? On the face of the agreement none is expressed except a present payment of 500*l.*, on account and in part of the larger debt then due and payable by law under the judgment. The appellant did not contract to pay the future instalments of 150*l.* each, at the times therein mentioned; much less did he give any new security, in the shape of negotiable paper, or in any other form. The promise *de futuro* was only that of the respondent, that if the half-yearly payments of 150*l.* each were regularly paid, she would "take no proceedings whatever on the judgment." No doubt if the appellant had been under no antecedent obligation to pay the whole debt, his fulfilment of the condition might have imported some consideration on his part for that promise. But he was under that antecedent obligation; and payment at those deferred dates, by the forbearance and indulgence of the creditor, of the residue of the principal debt and costs, could not, in my opinion, be a consideration for the relinquishment of interest and discharge of the judgment, unless the payment of the 500*l.*, at the time of signing the agreement, was such a consideration. As to accord and satisfaction, in point of fact there could be no complete satisfaction so long as any future instalment remained payable; and I do not see how any mere payments on account could operate in law as a satisfaction *ad interim*, conditionally upon other payments being afterwards duly made, unless there was a consideration sufficient to support the agreement while still unexecuted. Nor was anything, in fact, done by the respondent in this case, on the receipt of the last payment, which could be tantamount to an acquittance, if the agreement did not previously bind her.

The question, therefore, is nakedly raised by this appeal, whether your lordships are now prepared, not only to overrule as contrary to law, the doctrine stated by Sir EDWARD COKE to have been laid down by all the judges of the Common Pleas, in *Pinnel's Case* in 1602, and repeated in his note to Littleton, sect. 344; but to treat a prospective agreement, not under seal, for satisfaction of a debt, by a series of payments on account to a total amount less than the whole debt, as binding in law, provided those payments are regu-

larly made; the case not being one of a composition with a common debtor, agreed to, *inter se*, by several creditors. I prefer so to state the question instead of treating it (as put at the bar) as depending on the authority of *Cumber* v. *Wane*, 1 Str. 426, decided in 1718. It may well be that distinctions, which in later cases have been held sufficient to exclude the application of that doctrine, existed and were improperly disregarded in *Cumber* v. *Wane*; and yet that the doctrine itself may be law, rightly recognised in *Cumber* v. *Wane*, and not really contradicted by any later authorities. And this appears to me to be the true state of the case. The doctrine itself, as laid down by Sir EDWARD COKE, may have been criticised as questionable in principle, by some persons whose opinions are entitled to respect, but it has never been judicially overruled; on the contrary, I think it has always, since the sixteenth century, been accepted as law. If so, I cannot think that your lordships would do right, if you were now to reverse as erroneous a judgment of the Court of Appeal, proceeding upon a doctrine which has been accepted as part of the law of England for two hundred and eighty years.

The doctrine, as stated in *Pinnel's Case* is "that payment of a lesser sum on the day" (it would of course be the same after the day), "in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the judges, that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum." As stated in Coke Littleton 212, it is, "where the condition is for payment of 20*l.* the obligor or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater;" adding (what is beyond controversy), that an acquittance under seal, in full satisfaction of the whole, would (under like circumstances) be valid and binding.

The distinction between the effect of a deed under seal, and that of an agreement by parol, or by writing not under seal may seem arbitrary, but it is established in our law; nor is it really unreasonable or practically inconvenient that the law should require particular solemnities to give to a gratuitous contract the force of a binding obligation. If the question be (as in the actual state of the law, I think it is), whether consideration is or is not given in a case of this kind, by the debtor who pays down part of the debt presently due from him, for a promise by the creditor to relinquish, after

certain further payments on account, the residue of the debt, I cannot say that I think consideration is given, in the sense in which I have always understood that word as used in our law. It might be (and indeed I think it would be) an improvement in our law, if a release or acquittance of the whole debt, on payment of any sum which the creditor might be content to receive by way of accord and satisfaction (though less than the whole), were held to be, generally, binding, though not under seal; nor should I be unwilling to see equal force given to a prospective agreement, like the present, in writing though not under seal; but I think it impossible, without refinements which practically alter the sense of the word, to treat such a release or acquittance as supported by any new consideration proceeding from the debtor. All the authorities subsequent to the case of *Cumber* v. *Wane*, 1 Str. 246, which were relied upon by the appellant at your Lordships' Bar (such as *Sibree* v. *Tripp*, 15 M. & W. 23; *Curlewis* v. *Clark*, 3 Ex. 375, and *Goddard* v. *O'Brien*, 9 Q. B. Div. 37), have proceeded upon the distinction, that, by giving negotiable paper or otherwise, there had been some new consideration for a new agreement, distinct from mere money payments in or towards discharge of the original liability. I think it unnecessary to go through those cases, or to examine the particular grounds on which each of them was decided. There are no such facts in the case now before your Lordships. What is called "any benefit, or even any legal possibility of benefit," in Mr. Smith's notes to *Cumber* v. *Wane*, is not (as I conceive) that sort of benefit which a creditor may derive from getting payment of part of the money due to him from a debtor who might otherwise keep him at arm's length, or possibly become insolvent, but is some independent benefit, actual or contingent, of a kind which might in law be a good and valuable consideration for any other sort of agreement not under seal.

My conclusion is, that the order appealed from should be affirmed, and the appeal dismissed, with costs, and I so move your Lordships.

Lord BLACKBURN.—My Lords, the first question raised is as to what was the true construction of the memorandum of agreement made on the 21st of December 1876. What was it that the parties by that writing agreed to?

The appellants contend that they meant that on payment down

of 500*l.*, and payment within a month after the 1st day of July and the 1st day of January in each ensuing year of 150*l.* until the sum of 2090*l.* 19*s.* was paid, the judgment for that sum and interest should be satisfied, for an agreement to take no proceedings on the judgment is equivalent to treating it as satisfied. This construction of the memorandum requires that after the tenth payment of 150*l.* there should be a further payment of 90*l.* 19*s.* made within the next six months. This is the construction which all three courts below have put upon the memorandum.

The respondent contends that the true construction of the memorandum was that time was to be given on those conditions for five years, the judgment being on default of any one payment enforceable for whatever was still unpaid, with interest from the date the judgment was signed, but that the interest was not intended to be forgiven at all.

If this is the true construction of the agreement the judgment appealed against is right and should be affirmed, whether the reason on which the Court of Appeal founded its judgment was right or not. I am, however, of opinion that the courts below, who on this point were unanimous, put the true construction on the memorandum. I do not think the question free from difficulty. It would have been easy to have expressed, in unmistakable words, that on payment down of 500*l.*, and punctual payment at the rate of 300*l.* a year till 2090*l.* 19*s.* was paid, the judgment should not be enforced either for principal or interest; or language might have been used which should equally clearly have expressed that though time was to be given, interest was to be paid in addition to the instalments. The words actually used are such that I think it is quite possible that the two parties put a different construction on the words at the time; but I think the words, "till the said sum of 2090*l.* 19*s.* shall have been fully paid and satisfied" cannot be construed as meaning "till that sum, with interest from the day judgment was signed, shall have been fully paid and satisfied," nor can the promise "not to take any proceedings whatever on the judgment" be cut down to meaning any proceedings except those necessary to enforce payment of interest.

I think, therefore, that it is necessary to consider the ground on which the Court of Appeal did base their judgment, and to say whether the agreement can be enforced. I construe it as accepting and taking 500*l.* in satisfaction of the whole 2090*l.* 19*s.*, subject

to the condition that unless the balance of the principal debt was paid by instalments, the whole might be enforced with interest. If, instead of 500*l.* in money, it had been a horse valued at 500*l.*, or a promissory note for 500*l.*, the authorities are that it would have been a good satisfaction; but it is said to be otherwise, as it was money. This is a question, I think, of difficulty.

In Coke Littleton 212 b., Lord COKE says: "Where the condition is for payment of 20*l.*, the obligor or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater. * * If the obligor or feoffor pay a lesser sum either before the day or at another place than is limited by the condition, and the obligee or feoffee receiveth it, this is a good satisfaction." For this he cites *Pinnel's Case*. That was an action on a bond for 16*l.*, conditioned for the payment of 8*l.* 10*s.*, on the 11th of November 1600. Plea that defendant, at plaintiff's request, before the said day, to wit, on the 1st of October, paid to the plaintiff 5*l.* 2*s.* 2*d.*, which the plaintiff accepted in full satisfaction of the 8*l.* 10*s.* The plaintiff had judgment for the insufficient pleading. But though this was so, Lord COKE reports that it was resolved by the whole Court of Common Pleas, "that payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum: but the gift of a horse, hawk, or robe, &c., in satisfaction is good, for it shall be intended that a horse, hawk, or robe, &c., might be more beneficial to the plaintiff than the money, in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction. But when the whole sum is due, by no intendment the acceptance of parcel can be a satisfaction to the plaintiff; but in the case at bar it was resolved that the payment and acceptance of parcel before the day in satisfaction of the whole, would be a good satisfaction in regard of circumstance of time; for peradventure parcel of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material; so, if I am bound in 20*l.* to pay you 10*l.* at Westminster, and you request me to pay you 5*l.* at the day at York, and you will accept in full satisfaction for the whole 10*l.*, it is a good satisfaction for the whole, for the expenses to pay it at York is sufficient satisfaction."

There are two things here resolved. First, that where a matter paid and accepted in satisfaction of a debt certain, might by any possibility be more beneficial to the creditor than his debt, the court will not inquire into the adequacy of the consideration. If the creditor, without any fraud, accepted it in satisfaction when it was not a sufficient satisfaction, it was his own fault. And that payment before the day might be more beneficial, and consequently that the plea was in substance good, and this must have been decided in the case.

There is a second point stated to have been resolved, viz.: "That payment of a lesser sum on the day cannot be any satisfaction of the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum." This was certainly not necessary for the decision of the case; but though the resolution of the Court of Common Pleas was only a dictum, it seems to me clear that Lord COKE deliberately adopted the dictum, and the great weight of his authority makes it necessary to be cautious before saying that what he deliberately adopted as law was a mistake; and though I cannot find that in any subsequent case this dictum has been made the ground of the decision, except in *Fitch* v. *Sutton*, 5 East 230, as to which I shall make some remarks later; and in *Down* v. *Hatcher*, 10 A. & E. 121, as to which PARKE, B., in *Cooper* v. *Parker*, 15 C. B. 828, said: "Whenever the question may arise as to whether *Down* v. *Hatcher* is good law, I should have a great deal to say against it," yet there certainly are cases in which great judges have treated the dictum in *Pinnel's Case*, 5 Rep. 117 a., as good law.

For instance, in *Sibree* v. *Tripp*, 15 M. & W. 33, PARKE, B., says: "It is clear if the claim be a liquidated and ascertained sum, payment of part cannot be satisfaction of the whole, although it may, under certain circumstances, be evidence of a gift of the remainder." And ALDERSON, B., in the same case says: "It is undoubtedly true that payment of a portion of a liquidated demand, in the same manner as the whole liquidated demand which ought to be paid, is payment only in part, because it is not one bargain, but two; viz., payment of part, and an agreement without consideration to give up the residue. The court might very well have held the contrary, and have left the matter to the agreement of the parties, but undoubtedly the law is so settled." After such strong expressions of opinion, I doubt much whether any judge sitting in a court of the first

instance would be justified in treating the question as open. But as this has very seldom, if at all, been the ground of the decision even in a court of the first instance, and certainly never been the ground of a decision in the Court of Exchequer Chamber, still less in this house, I did think it open in your lordship's house to reconsider this question. And, notwithstanding the very high authority of Lord COKE, I think it is not the fact that to accept prompt payment of a part only of a liquidated demand, can never be more beneficial than to insist on payment of the whole. And, if it be not the fact, it cannot be apparent to the judges.

I will first examine the authorities. If a defendant pleaded the general issue, the plaintiff could join issue at once, and, if the case was not defended, get his verdict at the next assizes. But by pleading a special plea, the plaintiff was obliged to reply, and the defendant often caused the plaintiff, merely by the delay occasioned by replying, to lose an assize. If the replication was one to which he could demur, he made this sure. Strangely enough, it seems long to have been thought that if the defendant kept within reasonable bounds, neither he nor his lawyers were to blame in getting time in this way by a sham plea,—that a chattel was given and accepted in satisfaction of the debt. The recognised forms were giving and accepting in satisfaction a beaver hat (*Young* v. *Rudd*, 5 Mod. 86), or a pipe of wine. All this is now antiquated. But whilst it continued to be the practice, the plea founded on the first part of the resolution in *Pinnel's Case* were very common, and that law was perfectly trite. No one for a moment supposed that a beaver hat was really given and accepted; but every one knew that the law was that if it was really given and accepted, it was a good satisfaction. Bnt special pleas, founded on the other resolution in *Pinnel's Case*, on what I have ventured to call the dictum, were certainly not common. I doubt if a real defence of this sort was ever specially pleaded. When there really was a question as to whether a debt was satisfied by a payment of a smaller sum, the defendant pleaded the general issue, and if it was proved to the satisfaction of the jury that a smaller sum had been paid and accepted in satisfaction of a greater, if objection was raised the jury might, perhaps, as suggested by HOLROYD, J., in *Thomas* v. *Heathorn*, 2 B. & C. 482, find that the circumstances were such that the legal effect was to be as if the whole was paid down and a portion thrown back as a God's-penny. This, however, seems to me to be an

unsatisfactory and artificial way of avoiding the effect of the dictum, and it could not be applied to such an agreement as that now before this house.

For whatever reason it was, I know of no case in which the question was raised whether a payment of a lesser sum could be satisfaction of a liquidated demand, from *Pinnel's Case* down to *Cumber* v. *Wane*, 5 Geo. I., a period of one hundred and fifteen years.

In *Adams* v. *Tapling*, 4 Mod. 88, where the plea was bad for many other reasons, it is reported to have been said by the court, that: "In covenant where the damages are uncertain, and to be recovered, as in this case, a lesser thing may be done in satisfaction, and there 'accord and satisfaction' is a good plea." No doubt, this was one of the cases which PARKE, B., would have cited in support of his opinion, that *Down* v. *Hatcher* was not good law. The court are said to have gone on to recognise the dictum in *Pinnel's Case*, or at least not to dissent from it, but it was not the ground of their decision. In every other reported case which I have seen the question arose on a demurrer to a replication to what was obviously a sham or dilatory plea.

Some doubt has been made as to what the pleadings in *Cumber* v. *Wane* really were. I have obtained the record. The plea is, that after the promises aforesaid, and before the issuing of the writ, it was agreed between the said George and Edward Cumber, that he, the said George, "daret eidem Edwardo Cumber quandm notam in script vocatam 'a promissory note,' *manu propria ipsius Georgii subscript pr. solucon eidem Edwardo Cumber vel ordini quinque librarum*," fourteen days after date, in full satisfaction and exoneration of the premises and promises, which said note in writing the said George then gave to the said Edward Cumber, and the said Edward Cumber then and there received from the said George the said note in full satisfaction and discharge of the premises and promises.

The replication is that, "the said George did not give to him, Edward, any note in writing called a promissory note, with the hand of him, George, subscribed for the payment to him, Edward, or his order of 5*l.*, fourteen days after date, in full satisfaction and discharge of the premises and promises." To this there is a demurrer and judgment in the Common Pleas for the plaintiff "that the replication was good in law."

The Reporter, oddly enough, says there was an immaterial replication. The effect of the replication is to put in issue the substance of the defence, namely, the giving in satisfaction: *Young* v. *Rudd*, 5 Mod. 86, and certainly that was not immaterial. But for some reason, I do not stop to inquire what, PRATT, C. J., prefers to base the judgment affirming that of the Common Pleas on the supposed badness of the plea rather than on the sufficiency of the replication. It is impossible to doubt that the note, which it is averred in the plea was given as satisfaction, was a negotiable note. And, therefore, this case is in direct conflict with *Sibree* v. *Tripp*.

Two cases require to be carefully considered. The first is *Heathcote* v. *Crookshanks*, 2 T. R. 24. The plea there pleaded would, I think, now be held perfectly good, see *Norman* v. *Thompson*, 4 Ex. 755; but BULLER, J., seems to have thought otherwise. He says, "thirdly, it was said that all the creditors were bound by this agreement to forbear, but that is not stated by the plea. It is only alleged that they agreed to take a certain proportion, but that is a nudum pactum, unless they had afterwards accepted it. In the case in which *Cumber* v. *Wane* was denied to be law (*Hardcastle* v. *Howard*, 26 Geo. III., B. R.), the party actually accepted. But as the plaintiff in the present case refused to take less than the whole demand, the plea is clearly bad."

That decision goes entirely on the ground that accord without satisfaction is not a plea. I do not think it can be fairly said that BULLER, J., meant by saying "that is a nudum pactum, unless they had afterwards accepted it," to express an opinion that if the dividend had been accepted it would have been a good satisfaction. But he certainly expresses no opinion the other way.

In *Fitch* v. *Sutton*, 5 East 230, not only did the plaintiff not accept the payment of the dividend in satisfaction, but refused to accept it at all, unless the defendant promised to pay him the balance when of ability, and the defendant assented and made the promise required, so that but for the fact that other creditors were parties to the composition there could have been no defence. There was no point of pleading in that case, the whole being open under the general issue. And in *Steinman* v. *Magnus*, 11 East 390, it was pretty well admitted by Lord ELLENBOROUGH, that the decision in *Fitch* v. *Sutton* would have been the other way, if they had understood the evidence as the Reporter did. But though this misapprehension of the judges as

to the facts, and the absence of any acceptance of the dividend, greatly weaken the weight of *Fitch* v. *Sutton*, still it remains that Lord ELLENBOROUGH, a very great judge indeed, did, however hasty or unnecessary it may have been to express such an opinion, say, "It is impossible to contend that acceptance of 17*l.* 10*s.* is an extinguishment of a debt of 50*l.* There must be some consideration for the relinquishment of the residue; something collateral, to show a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is nudum pactum. But the mere promise to pay the rest when of ability put the plaintiff in no better condition than he was before. It was expressly determined in *Cumber* v. *Wane*, that acceptance of a security for a lesser sum cannot be pleaded in satisfaction of a similar security for a greater. And though that case was said by me in argument in *Heathcote* v. *Crookshanks*, to have been denied to be law, and in confirmation of that, BULLER, J., afterwards referred to a case, stated to be that of *Hardcastle* v. *Howard*, 26 Geo. III., yet I cannot find any case of that sort, and none has been now referred to; on the contrary the decision in *Cumber* v. *Wane*, is directly supported by the authority of *Pinnel's Case*, which never appears to have been questioned.

I must observe that, whether *Cumber* v. *Wane* was or was not denied to be law in *Hardcastle* v. *Howard*, it certainly was denied to be law in *Sibree* v. *Tripp*, and that, though it is quite true that *Pinnel's Case*, as far as regards the points actually raised in the case, has not only never been questioned, but is often assented to, I am not aware that in any case before *Fitch* v. *Sutton*, unless it be *Cumber* v. *Wane*, has that part of it which I venture to call the dictum ever been acted upon; and as I have pointed out, had it not been for the composition with other creditors, there could have been no defence in *Fitch* v. *Sutton*, whether the dictum in *Pinnel's Case* was right or wrong.

Still this is an authority, and I have no doubt that it was on the ground of this authority, and the adhesion of BAYLEY, J., to it in *Thomas* v. *Heathorn*, that Barons PARKE and ALDERSON expressed themselves as they did in the passages I have cited from *Sibree* v. *Tripp*. And I think that their expressions justify Mr. John William Smith in laying it down as he does in his note to *Cumber* v. *Wane*, in the second edition of his Leading Cases, that, "a liquidated and undisputed money demand, of which the day of pay-

ment is passed (not founded upon a bill of exchange or promissory note), cannot even with the consent of the creditor be discharged by mere payment by the debtor of a smaller amount in money in the same manner as he was bound to pay the whole." I am inclined to think that this was settled in a court of the first instance. I think, however, that it was originally a mistake.

What principally weighs with me in thinking that Lord COKE made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so. I had persuaded myself that there was no such long-continued action on this dictum as to render it improper in this house to reconsider the question. I had written my reasons for so thinking; but as they were not satisfactory to the other noble and learned lords who heard the case, I do not repeat them nor persist in them.

I assent to the judgment proposed, though it is not that which I had originally thought proper.

Appeal dismissed with costs.

Concurring opinions were delivered by Lords WATSON and FITZGERALD.[1]

[1] See note to *Goddard* v. *O'Brien*, 21 Am. Law Reg. (N. S.) 639.

RECENT AMERICAN DECISIONS.

Supreme Judicial Court of Massachusetts.

DODD *v.* JONES.

A contract to assign an insurance policy to the purchaser of the insured property is a contract of sale, and the measure of damages for breach thereof is only that amount necessary to procure a policy for the remainder of the time it had to run, not the value of the house, which burned down while the promisee relied upon the fulfilment of the contract and neglected to insure.

ACTION of contract to recover for the non-assignment of a certain fire insurance policy. The facts appear in the opinion. At the trial below the verdict was for plaintiff in the sum of $5.94, the